STATE OF ILLINOIS

ILLINOIS COMMERCE COMMISSION

ALHAMBRA-GRANTFORK	**)**	
TELEPHONE COMPANY	**)**	
	)	**Docket No. 04-0354**
Petition For Universal Service Support	**)**	

REPLY BRIEF

OF

ALHAMBRA-GRANTFORK TELEPHONE COMPANY

TABLE OF CONTENTS

ARGUMENT

I. SUMMARY OF CONFLICTING ARGUMENTS

Staff and SBC assert several contradictory arguments in their initial briefs.

A. Both Staff and SBC argue that AGTC should not receive ISUF funding, because AGTC was motivated, in part, to comply with 13-517 by providing advanced services. Later, both argue that the Commission should project AGTC's federal USF support beyond 2005 and adjust AGTC's current revenue deficiency, because AGTC *may* receive increased federal funding in future years due to its plant improvements in 2003 and 2004. However, if AGTC will receive federal USF funding for its plant upgrades in future years, then AGTC's plant upgrades *must* qualify as one or more of the federal supported services under 47 CFR §54.101 in order for AGTC to receive federal USF funding for those improvements. Therefore, there is no substance to the argument that the Commission should deny AGTC IUSF support on the basis that AGTC's plant upgrades also provide advanced services. (See Argument V).

B. SBC argues that the Commission should defer deciding AGTC's case until the high cost fund *expires*, but if the fund expires, there will be no possible way to favorably grant AGTC's request. This argument is tantamount to an indirect denial of the request. In fairness, SBC, also argues that the fund should be reviewed in 2006. (See Argument II).

C. A variant of the argument in favor of multi-year projections of federal USF funding is SBC's argument that AGTC's request should be denied, because AGTC will recover its investments in its plant upgrades in 2006 and beyond, so the Commission should wait until 2006 and review AGTC's request at that time. Of course, denying support until

2006 is effectively a denial of AGTC's request. However, if the Commission *grants* AGTC's funding request and reviews funding levels in 2006 (only one year from now), the uncertainty of future years will be removed and the Commission will be in a better position to evaluate what AGTC's actual future federal USF funding will be. (See Argument II).

D. Staff and SBC allege that they are not seeking an adjustment in the affordable rate of $20.39. 13-301(b) uses the affordable rate as a key factor in determining a Company's revenue deficiency for Illinois universal service support. Nevertheless, Staff and SBC maintain that AGTC should be denied IUSF funding because, they argue, "nothing in the Act" prevents AGTC from raising its rates *above* the affordable rate. AGTC calculated its revenue deficiency of $101,322.00 on the basis of the affordable rate of $20.39. Denying AGTC IUSF support on the basis that it should seek its revenue deficiency from its customers by charging *more than* the affordable rate contradicts the representation by Staff and SBC that they are not seeking an increase in the affordable rate, at least as it pertains to AGTC. This argument violates both the policy of universal service in 13-103 of the Act and the usage of the affordable rate in calculating support in 13-301(d). (See Argument VI below).

E. Staff argues that AGTC's funding request should be denied because the fund is "set", meaning it is not capable of adjustment. However, the fund was recently adjusted upward because of the *Harrisonville v. Ill.Com.Com.*, 212 Il.^{2nd} 237, 250 (2004) decision, which remanded the case to the Commission to increase funding for carriers due to the Commission's failure to fund all access lines. See Commission Order in 00-0233 dated December 27, 2004. Staff also claims that granting AGTC's funding on the same basis that other companies were funded in the 2nd I.O. on Rehearing in Docket 00-0233, will change the fund size and lead to funding inequities, because some carriers that have received funding in the past may now be over-earning. The absurdity of this argument is that denying AGTC's request on the basis of *unproven* over-earnings by some *unidentified* carrier is not only considering matters not in evidence (a violation of 5 ILCS 100/10-35(c)), it is egregiously inequitable and unjust. A company such as AGTC that qualifies for and needs funding should not be denied funding because another carrier *might* be receiving more than it otherwise should. (See Argument II).

F. Finally, perhaps the most inconsistent argument presented by Staff is the assertion that allowing AGTC to qualify for funding on the same basis that was established in the 2nd I.O. on Rehearing (except for 2003 as the test year) will lead to "piecemeal revisions" to the fund and that using that same methodology will lead to a host of subsidy options. Using the same methodology as established in the IUSF case to adjust for a change in circumstances is not only consistent with the 2nd I.O. and 2nd I.O. on Rehearing, it does not lead to any options or inequities. (See Argument II).

II. IT IS MANIFESTLY IN THE PUBLIC INTEREST TO PROVIDE IUSF SUPPORT TO AGTC AND NOT WAIT UNTIL 2006.

Staff and SBC rely on worn out clichés and buzz words to assert that the IUSF is not a "make-whole" fund and that it is not intended to "guarantee" a specific rate of return (ROR). (Staff Br. @ 12) Staff concludes that the Commission would be "ill-advised" to grant AGTC any relief, because applying the same test to AGTC at this point and granting it IUSF support would somehow be a "non-methodical, piecemeal review" that could lead to "funding inequities." (Staff Br. @ 14-15.) SBC echoes Staff's position and asserts that the Commission should defer a decision on AGTC's petition until 2006 and consider it along with all other companies. (SBC Br. @ 13.) This language demonstrates a concerted effort to demonize universal service as an evil that the Commission should avoid at all costs. However, the Illinois legislature and the Illinois Supreme Court strongly disagree with Staff, and it is the legislature that declares the policy of universal service.

Nowhere in either Staff's brief or SBC's brief was the recent decision of *Ill.Com.Com. v. Harrisonville Tel Co.*, 212 Il.2nd 237, 250 (2004) (*Harrisonville)* discussed, cited, or acknowledged, even though the holding in that case dramatically impacts the arguments raised by Staff and SBC. In *Harrisonville*, the Supreme Court emphasized that the legislature has declared universal service as a *worthy* goal, and the Commission is not authorized to reduce support in a way inconsistent federal universal service support or with universal service policy goals in 13-103 of the Act.

Both Staff and SBC argue for an arbitrary denial of funding to AGTC without regard to the limitations placed upon the Commission in the *Harrisonville* decision and without regard to the Supreme Court's interpretation of the legislative policy in 13-103 for providing services at affordable rates as widely as possible to satisfy the public interest. Nowhere do either SBC or the Staff ground their arguments in any statutory policy language in 13-103(a), nor do they point to any language in the Act to justify the discriminatory treatment that they seek to impose upon AGTC. The reason that neither SBC nor Staff cite any case law or legislative support for their proposals is because not only are their recommendations wrong, they are blatantly unlawful and hostile to the goals of both 13-103(a) and 13-301(d). Staff and SBC argue for positions that are neither fair, just, nor reasonable in any sense.

Staff cites the language in the 4th I.O. that the Commission's review of AGTC's petition need not be identical to that used in the USF case, 00-0233. (Staff Br. @ 11.) At the same time, Staff also points out that AGTC bears the burden of proof, but combined, these two procedural arguments place AGTC in the impossible position of having to prove unknown and previously unstated standards for IUSF support. Proof of new standards without notice would amount to a denial of due process and equal protection. See, *I. Erlichman v. ILCC*, 92 Ill.App.3rd 1091 (1981). Clearly AGTC has the burden of proof but it is entitled to notice of any changes from the 2nd I.O. on Rehearing in 00-0233 that must prove in order to be successful (5 ILCS 100/10-35), and no party has shown any legitimate reason to depart from the basic framework for funding that was established in the USF case (00-0233).

Quoting from the 4th I.O., Staff and SBC emphasize the sentence which reads as follows:

> Moreover, nothing in the Act or the Commission's prior orders entitles each recipient LEC seeking USF support to a specified rate of return.

A pubic utility is entitled to earn a reasonable ROR. *Sprague v. Biggs*, 390 Ill. 537(1945); *Island Lake Water Co. v. Ill .Com .Com.*, 65 Ill.App.3d 853 (1978). While AGTC has not alleged that it is *guaranteed* a specific ROR, AGTC's presentation was based on an 11.21% ROR, the same rate the Commission employed in 00-0233, the USF case. Neither Staff nor SBC point to any reason why the specific ROR of 11.21% should not be used, and neither Staff nor SBC argues for a higher or lower specified ROR. However, Staff and SBC mischaracterize this language to argue that that the IUSF does not guarantee carriers IUSF support, so AGTC should be denied funding. While it is true that nothing in the Act or prior Commission orders guarantees a LEC IUSF support, the 2nd I.O. and 2nd I.O. on Rehearing did set forth the methodology for support using 11.21% as the ROR, and AGTC qualifies on that basis.

Staff alleges that AGTC's petition is "facially defective" because it is little more than an assertion that it is under-earning. (Staff Br. @ 12-14, 22.) AGTC specifically alleged in its petition that its change in circumstances since the USF case in 2001 was due to significant plant upgrades of supported services in 2003 and 2004. Staff did not file a motion to dismiss AGTC's petition. In docket 00-0233, Staff affirmatively stated that it had no objection to considering AGTC's request for funding and that AGTC's proof must be *consistent with 13-301(d) and Commission ordered requirements* in docket 00-0233. (4th I.O. @ 3.) Staff is estopped now from arguing that AGTC's petition be denied solely because AGTC must wait for a general fund review. Staff has dramatically changed its previous position by departing from 13-301(d) and the Commission's requirements in the 2nd I.O. and 2nd I.O. on Rehearing for no apparent reason. Staff contested the evidence presented by AGTC in this case, so the argument that the petition is "facially defective" is waived. Moreover, Staff's argument that AGTC's petition should be summarily denied makes a sham of the application process and denigrates these proceedings to a mockery of the IUSF. If the Commission was going to automatically deny AGTC's petition because it had to be reviewed with all other companies, the Commission should have dismissed AGTC's petition when it was still in docket 00-0233.

The Staff argues that it would be "poor public policy" and wasteful (Staff Br. @ 12) to consider AGTC's petition outside the context of a general review of the entire fund for all companies, because the Commission has "already decided" upon the appropriate level of funding and determined that the fund size should be $11,992,215. In essence, this circular argument means that the current fund size should remain the fund size for no other reason than the current fund size is the present fund size. Staff's argument that the fund size is somehow locked in at one fixed number and that it is "ill-advised" to change support levels, even in the face of changing circumstances is without justification in policy or law. Continuing, Staff states that it is "ill advised" to commence "piecemeal revision" before the fund is reviewed generally because that could lead to "funding inequities". (Staff Br. @ 14-15.) Essentially the Staff is contesting the Commission's decision in the 4th I.O. In the 4th I.O., the Commission declined to revisit the funding level for all companies via AGTC's petition, which was addressed solely to relief for AGTC, and the Commission explicitly allowed AGTC to file its petition and have it considered.

Why AGTC and its subscribers should be denied USF support until all companies are all reviewed simultaneously defies logic and reason and is indicative of the bias Staff and SBC have against the basic concept of universal service. Universal service does involve a subsidy, a legislatively *endorsed* subsidy that encourages wider availability of telecommunication's services at the affordable rate. Staff's argument for disparate treatment to AGTC, however, amounts to a denial of equal protection. The analysis employed to assess equal protection claims is the same under both the United States and Illinois Constitutions (U.S. Const., amend. XIV, §1; Ill. Const.1970, art. I, §2). *People v. Fisher*, 184 Ill.2nd 441, 450 (1998). The guarantee of equal protection of the law requires the government to treat similarly situated individuals in a similar manner. *In re R.C.*, 195 Ill.2nd 291, 309, (2001); *Fisher*, 184 Ill.2nd at 450. The government may not accord different treatment to individuals based on criteria wholly unrelated to the purpose of the legislation.

Affording AGTC the same treatment that was afforded all other LECs does not lead to funding inequities, but denying AGTC support is certain to do so and would be a denial of equal protection. If AGTC's costs of service have legitimately changed, it would be inequitable to deny AGTC support until the time that all companies' costs of services are reviewed simultaneously simply as a matter of convenience. In fact, the 4th I.O. recognized that because AGTC's costs of service have changed *is* a reason to consider AGTC's request at this time. (4th I.O. @ 7-8.)

Staff is asking the Commission to deny AGTC support in contravention of the 4th I.O., which allowed AGTC to apply for that support. Staff seems to be endorsing the concept that AGTC can apply, but because its request is not being reviewed with all other companies at the same time, AGTC's petition must necessarily be denied for that reason alone. This prejudicial approach is a fundamental denial of due process because it predetermines the outcome of AGTC's petition without regard to the evidence. A fair trial before an unbiased decision maker is a basic requirement of due process, a requirement that applies to both courts and administrative agencies, *Girot v. Keith*, 212 Il.2nd 372 (2004); *BPI v. Barnich*, 244 Ill.App.3d 291 (1993), and it would be a violation of due process to prejudge AGTC's request by denying it without considering the merits.

Staff's position, taken to its logical extreme, is absurd. Staff could just as easily argue that *all* petitions filed with the Commission should be denied because that would be convenient and it would deter other utilities from filing! Due process prevents the state from exercising its power in an arbitrary and unreasonable manner. *Opyt's Amoco, Inc.,* 149 Ill.2nd at 270, citing *Illinois Gamefowl Breeders Ass'n v. Block,* 75 Ill.2nd 443, 453 (1954). Due process protections ensure that a fair trial is provided to its participants, for due process of law guarantees a fair and impartial hearing. *Balmoral Racing Club, Inc. v. The Illinois Racing Board* 151 Ill.2nd 367 (1992). Staff's preconceived notion throws the concept of due process out the window because it prejudges the outcome in an arbitrary and unreasonable manner.

Staff proclaims that granting relief to AGTC will allow eligible companies to "pick and choose" and allow them to shop around for the best subsidy levels. (Staff Br. @ 15.) AGTC has presented evidence based on the same framework as approved by the Commission in the 2nd I.O. and 2nd I.O. on Rehearing and that all other LECs used in that case (except for a 2003 test period). (AGTC Ex 3 @ 4.) There is absolutely nothing in the evidence to support the "pick and choose" notion and it completely mischaracterizes the entire nature of AGTC's request. If a company's costs change over time (a possibility the 4th I.O. acknowledged), then applying the same test as set forth in the 2nd I.O. and 2nd I.O. on Rehearing does not create any subsidy options.

Staff resorts to scare tactics and a parade of horribles to fallaciously argue against support for AGTC. Staff argues that granting relief to AGTC will increase the fund size and that subscribers will face higher surcharges, emphasizing the word "higher". (Staff Br. @ 15-16.) Actually, the rate of the surcharges will not necessarily increase because the fund size diminishes each year during the 5-year phase-in. (See 2nd I.O. on Rehearing Appendix, columns I, K, M, O, and Q.) Granting AGTC's request would increase the fund's obligations during the last years of the phase in, but that is not a valid reason to deny support any more than it was a reason to deny support for secondary lines in *Harrisonville v. Ill.Com.Com.* Moreover, AGTC's impact on the fund will be miniscule, less than 2¢ per year per subscriber. (AGTC Ex. 5 @ 7.)

Staff argues that granting relief to AGTC would mean that the fund size would invariably increase over time, because existing carriers that are earning in excess of the target ROR of 11.21% will continue to receive subsidies at the level set in the IUSF proceeding. Of course, denying relief to AGTC does not solve an unproven problem that is far beyond the scope of this proceeding. There is no evidence in this case that *any* company is over-earning or receiving too much from the IUSF. Any reliance on such non-evidence is a violation of the Administrative Procedures Act. 5 ILCS 100/10-35(c). Carriers that are earning in excess of a target ROR (assuming there are such carriers) will continue to receive subsidies at the level set in the IUSF proceeding irrespective of the outcome in this case, and denying AGTC support on that basis would clearly be a denial of equal protection and due process.

When AGTC filed its petition in 00-0233, AT&T argued for reopening the entire IUSF proceeding to review via AGTC's petition for relief. The Commission in the 4th I.O. indicated that it was more prudent to wait until the 5-year phase-in period was complete before reevaluating all LECs' funding. Therefore, the Commission clearly signaled that whether other carriers are earning in excess of their target ROR is not a matter to be concerned with at this point in time and certainly is not a reason to disqualify AGTC, since the Commission in the same order indicated that AGTC was free to apply for support.

Staff argues that AGTC should be denied funding because it should be deterred from upgrading its network and that AGTC should wait until 2006 and have its case reviewed with all other companies as a matter of administrative convenience. That would mean that AGTC should have to timed its network improvements to meet some undetermined Staff review date. If AGTC is granted support now, its federal support level could be reviewed when the fund is reviewed, presumably in 2006. If AGTC has increased federal USF support, its IUSF support level will be reevaluated and adjusted, if necessary, at that time. It makes far more sense to grant AGTC support at the present time and allow AGTC's level of support to be reviewed simultaneously with other companies in 2006 or whenever the review process takes place, than it does to deny AGTC support as a matter of convenience.

Staff asserts that considerations of administrative economy militate against authorizing funding to AGTC. The economies that Staff is concerned about involve the unsupported claim that a large number of separate requests for increased IUSF will occur in the near future. As explained in AGTC's initial brief, other future requests should have no influence on this case.

III. THE ROR OPERATES AS A LIMIT ON SUPPORT, NOT AS A GUARANTEE.

Staff and SBC emphasize that the 4th I.O. does not entitle each recipient LEC to a specified ROR. (Staff Br. @ 16-22; SBC Br. @ 4, 9.) The 4th I.O. preceded the Supreme Court's decision in *Harrisonville vs. Ill.Com.Com.*, and that decision rejected the Commission's argument that it had to authority to deviate from FCC's support practices. Nevertheless, Staff's and SBC's attempt to use the language in the 4th I.O. as a vehicle to create new standards and to require AGTC to raise its rates above the affordable rate, (or lower its costs when Staff admits that AGTC's costs of services exceed the affordable rate or to somehow increase demand in high-cost areas) is clearly a violation of the law under 13-301(d) under *Harrisonville*.

Repeatedly, Staff argues that the IUSF is not intended as a guaranteed specific ROR. Staff's brief then proceeds with an explanation of what the IUSF is <u>not</u> intended for, but never does Staff affirmatively state what the IUSF is intended for. (See AGTC initial brief @ 2-7 for the purpose of USF). Instead, Staff and SBC assail the underlying principles of universal support.

While AGTC, like other non-competitive carriers, is entitled to change its local rates based on the simplified procedures of 13-504 (220 ILCS 5/13-504), that fact is completely irrelevant to considerations of universal service support. 13-504 was in existence when the Commission established the universal service fund in the 2nd I.O. Universal service support is provided to companies like AGTC because AGTC, like other supported carriers, is providing service in a high-cost area, and the lack of density in its service area does not allow AGTC sufficient revenue to provide services in a manner equivalent to urban areas. The legislature has determined that funding is appropriate for AGTC and other rural companies whose costs of service exceed the affordable rate. This is not a guarantee of a ROR.

Strangely, Staff argues that 13-504 frees AGTC and other carriers from the legal right to earn a specific Commission-approved ROR (Staff Br. @ 18-20).[1] Staff admits that the affordable rate is a tool used to establish the amount of universal service support to a company regardless of its rates. Therefore, for support purposes, a rate no higher than $20.39 should be used. The ROR is a limit on IUSF support for AGTC and other carriers and it is not a guarantee. Moreover, it is inconsistent for the Staff to argue that it is poor public policy for some LECs receiving support to get a ROR of more than 11.21% (which has not been proven) and also argue that it is appropriate for AGTC to be denied support and receive less than 11.21% simply because some other carriers *may* be earning in excess of their need

---

[1] This is not entirely accurate. If a complaint proceeding is initiated under 13-504 (220 ILCS 5/13-504), the Commission has the power to establish rates it finds to be just and reasonable.

for support. Staff does not seem to be concerned with the guaranteed support to the unidentified companies it believes are receiving in excess of 11.21%. Staff's position is a manifest miscarriage of justice and certainly not a lawful reason to deny AGTC support.

Staff argues that forward-looking costs are incompatible with guaranteeing a specific ROR based upon embedded costs. (Staff Br. @ 19-20.) While Staff claims that it does not intend to call into question the use of the ROR limitation, it does just that when it disparages the ROR procedure as a mechanism for guaranteeing a specified ROR. Without the ROR limitation, AGTC's proven need for support based upon the HAI model is $409,897 at a minimum. (AGTC Ex. 1.0, attch. 5.) Instead of adopting the ROR limitation, Staff and SBC attack it, which logically means that without the limitation, AGTC should be entitled to greater USF support based on forward-looking costs.

Staff indicates that it does not object to IUSF support being calculated as the difference between the book cost of providing supported services and the affordable rates for such supported services. (Staff Br. @ 20-21.) However, that is not the test that was developed in 00-0233 nor that Staff supported in this case. The ROR test in the USF docket calculated all revenues from all sources based upon the affordable rate in calculating support and that is the method that should be used here.

IV. THE "COMPELLING RATIONALE TEST" IS IRRATIONAL

A. The "Compelling Rationale Test" is unjustified.

Staff's "compelling rationale" test turns the IUSF policy in 13-103(a) on its head. As explained in AGTC's initial brief, there is no legal or policy reason for arbitrary limits and they appear to be created solely to disqualify AGTC from support much like changing the rules in the middle of a contest. Staff seeks to limit AGTC's request for IUSF support by requiring AGTC to demonstrate that its ROR is 3% below the 11.21% ROR and that its need for funding is due to a change beyond its control. The 3% limit is an arbitrary level and the $101,322 in support that AGTC seeks is a significant need. Staff believes that companies such as AGTC should rely on market based solutions to problems of reduced revenues. Market-based solutions do not exist for AGTC because if they did, AGTC would not be receiving federal USF support in a high-cost area. When Staff claims that the trend in the industry is moving towards more market-based solutions, that most certainly does not include high cost areas where the market, by definition, is too small to create a solution.

B. AGTC passes Staff's test.

Nevertheless, despite the irrationality of the "compelling rationale" test, assuming, *arguendo*, that such a test is adopted, AGTC meets the parameters of that test. AGTC has demonstrated that its ROR is approximately 3% below the target rate in the IUSF proceeding of 11.21%. (See Ex. 5.0, attach. 2, sch. 1.01, line 23, rate of return 8.15%.) (Staff does not argue for a different ROR and continues to use 11.21% in its brief.) Secondly, AGTC has demonstrated that its ROR is due to circumstances beyond its control. One of the examples the Staff uses as a circumstance beyond the Company's control is legislative requirements that impose additional costs. (Staff Br. @ 24.)[2] Staff and SBC argue that the primary driver to AGTC's increased costs is its decision to upgrade its outside plant to comply with the advanced services requirement of 13-517. Staff disparages AGTC when it argues that AGTC finds an undue economic burden to exist when it spends its own money but none to exist when it spends others' money. (Staff Br. @ 27.) This is an unfounded pejorative accusation

[2] Staff's footnote 9 acknowledges that the Commission should naturally consider the legislative intent of those legislative changes and as AGTC explained in its initial brief, at 19-20, 13-301 and 13-517 must be construed in harmony if possible. Staff's construction, however, defeats the legislative goals of both statutes.

that maligns a very well-run company of high integrity. AGTC's compliance with 13-517 is laudable and should not be criticized. An undue economic burden is not the statutory standard for USF support in 13-301(d), nor is it the policy stated in 13-103(a), and it is a gross distortion of the law to argue that AGTC is spending others' money. The Supreme Court has clearly rejected this effort to undermine universal service in *Harrisonville v. Ill.Com.Com.*

AGTC's decision to improve its outside plant, which also allowed it to meet the legislative requirement for advanced services, certainly qualifies under Staff's compelling rationale test. Staff argues that no law required AGTC to make this upgrade, but that is patently false, because 13-517 *explicitly* required AGTC to make advanced service available to 80% of its customers by January 1, 2005. Staff argues that AGTC's improvements do not qualify under its legislative mandate standard because advanced services are not a supported service, but clearly improvements to voice-grade services that also provide advanced services are supported services. (See Argument V.) AGTC's compliance with 13-517 means that it met the Staff's compelling rationale test.

Staff's effort to try this case as a waiver case, fails badly. While Staff acknowledges 13-517, it claims that AGTC's obligation to meet the standards in 13-517 could have been avoided by filing for a waiver. (Staff Br. @ 26-27 terms it an "exemption" but 13-517(b) refers to "waiver".) (See SBC Br. 10-11.) It is absurd to argue that AGTC could have sought a waiver instead of complying with the law. The existence or non-existence of a waiver process does not lessen AGTC's obligation to provide the service until a waiver is obtained. Certainly the Commission was not under any obligation to grant a waiver. Staff argues that AGTC will obtain more federal USF support for the improvements to its system, so clearly the improvements qualify as supported services under federal law.

Both SBC and Staff argue that toll redundancy is not an IUSF supported service, but clearly they are wrong. The argument that redundant toll and redundant 911 service are not needed because AGTC has not had a previous outage (Staff Br. @ 29) is like arguing against putting locks on the doors if there has not been a break-in or against buying insurance if one has not had a claim. Waiting for a tragedy to occur, when foreseeable remedies exist, is foolish, at best. Moreover, it is clear that toll redundancy is an industry standard and it is the normal engineering practice. (AGTC Ex. 3 @ 18-20; AGTC Ex 2 @3).

V. AGTC'S IMPROVEMENTS QUALIFY AS SUPPORTED SERVICES DESPITE THE ADVANCED SERVICES REQUIREMENT.

The argument that AGTC's voice-grade improvements and toll improvements to its network are not supported services because those improvements are also capable of providing advanced services is blatantly wrong. The FCC's pronouncement in the *Fourteenth Report and Order, Twenty-Second Order On Reconsideration* in Docket No 96-45, par. 200, released on May 21, 2001, on this point bears repeating:

> <u>The public switched telephone network is not a single-use network. Modern network infrastructure can provide access not only to voice services, but also</u> to data, graphics, video and <u>other services</u>. High-cost loop support is available to rural carriers to maintain existing facilities and make prudent facility upgrade. Thus, although the high-cost loop support mechanism does not support the provision of advanced services, <u>our policies do not impede the deployment of modern plant capable of providing access to advanced services. Rural carriers may consider both their present and future needs in determining what plant to deploy, knowing that prudent investment will be eligible for support</u>. The measures that we adopt in this Order will increase incentives for carriers to modernize their plant by increasing the

> total amount of high-cost loop support available under the cap. (Emphasis added.)

A LEC that upgrades its network in a way that includes advanced services will still be supported by federal USF and, therefore, Illinois must follow the FCC on this point. *Harrisonville v. Ill. Com. Com.,* 212 Il.^{2nd} at 251-252. Any other conclusion would defeat the legislative policy in both 13-103(a) on universal service and 13-517 on advanced services.

Staff argues that the statutory obligation to provide advanced services was not "cast in stone," and it implies that the mandate in 13-517 is optional because a waiver mechanism existed, but was not sought (Staff Br. @ 26) despite the unambiguous mandatory language in 13-517. As explained above, that construction of 13-517 is unsubstantiated. Moreover, the Commission provided support in the USF case, 00-0233, to companies that had just upgraded their network or were in the process of upgrading their networks for improved voice grade services with fiber capable of advanced services and those costs were included in establishing their funding levels. (AGTC Ex. 3 @ 4.) AGTC merely seeks the same treatment. AGTC's had air core copper cable that was very old and was at the end of its life cycle and its outside plant was heavily depreciated. (AGTC Ex 3 @4). Troubles with the plant were beginning to increase and replacing the copper with fiber was a prudent act which improved voice services (AGTC Ex 3 @ 28) and also allowed AGTC to provide advanced services. (AGTC Ex 3 @17-18). AGTC's business cycle simply occurred 3 years later than the IUSF case and that is not a reason to deny AGTC needed support. (AGTC Ex 3 @17).

Staff argues, on the one hand, that AGTC's improvements do not qualify for USF support, yet in the same breath they argue that AGTC will recover its investment from more federal USF support in future years for these very same upgrades (See Argument VIII). SBC and Staff cannot have it both ways. If the improvements are supportable on the federal level, they must be supported by the state IUSF as well.

VI. STAFF'S ARGUMENT FOR A DISGUISED INCREASE IN THE AFFORDABLE RATE IS ILLEGAL.

In the USF case, Staff argued for a higher affordable rate than the Commission allowed in both the initial case (2nd I.O. @ 21-22) and on rehearing in the USF case (2nd I.O. on Rehearing @ 3, 5.) Moreover, in the 4th I.O., the Commission stated that it did not intend to review the affordable rate in AGTC's case. (4th I.O. @ 8.) With this matter determined, Staffs argument for AGTC to increase its local rates is disingenuine, fallacious, and irresponsible. It is nothing more than an argument for a disguised increase in the affordable rate, something that the Commission has specifically rejected. Staff and SBC have the audacity to argue that nothing prevents AGTC from raising its rates above the affordable rate and that the affordable rate was merely a tool to establish the amount of support a small company receives, regardless of its rates. (Staff Br. @ 22.) (SBC Br. @ 11.) Of course, all that AGTC is using the ROR for in this case is a tool to establish the amount of support. AGTC should not be required to raise its rates *above* the affordable rate as a means of establishing the amount of support it should receive. Staff's own explanation for raising AGTC's rates above the affordable rate defies logic.

While Staff argues that nothing prevents AGTC from raising its rates above the affordable rate, this argument fails to account for state policy. State policy in 13-103 does not require AGTC to raise its rates above the affordable rate. Instead, state policy in 13-301 requires the Commission to make services available <u>at the affordable rate</u>, so requiring AGTC to change more than the affordable rate is illegal.

Staff stated that it wasn't arguing for an increase in the affordable rate but then it proceeded to do exactly that with SBC following. (Staff Br. @ 22; SBC Br. @ 11.) Staff contradicts the policy in 13-103, the use of the affordable rate in 13-301(d) and (e) and the Supreme Court's decision in *Harrisonville*, which held that rates in rural areas should be comparable to urban areas. SBC argues that AGTC should be required to raise its rates above the affordable rate instead of obtaining IUSF support. (SBC Br. @ 11-12.) The argument that nothing *prevents* AGTC from increasing its local rates above the affordable rate, while legally true, emasculates the purpose and policy of universal service if it means that AGTC is *required* to raise its rates instead of receiving IUSF support.

In the 2nd I.O. on Rehearing, SBC argued that there are numerous ways that a LEC can generate revenues, including increasing its rates, and that as much as possible should come from their own subscribers and not from customers of other companies. (2nd I.O. on Rehearing @15-16.) However, the Commission did not require rates to be raised above the affordable rate. When the Commission denied support for secondary lines knowing that would cause an increase in local rates above the affordable rate, (2nd I.O. on Rehearing @ 21-22), that action was condemned by the Supreme Court in *Harrisonville*. (212 Ill.2nd @ 248-251.) Therefore, the argument that AGTC should be denied universal service support because it can increase its rates above the affordable rate is tantamount to increasing the affordable rate above $20.39 and indisputably results in inequalities in funding by denying AGTC due process and equal protection and egregiously violates 13-103(a) and 13-301. Raising prices above the affordable rate is simply incompatible with the policy of universal service.

VII. SBC's ARGUMENT FOR DELAYED CONSTRUCTION IS CONTRARY TO THE POLICY OF 13-103(a) OF THE ACT.

Separately, SBC argues that AGTC should be denied funding because its need for funding is based on AGTC's own business decisions. Essentially all funding needs are based, in part, on business decisions. SBC repeatedly attempts to cast a business decision in a bad light. SBC appears to be arguing that AGTC's funding need was self-created by completing its plant improvements in two years instead of over a longer period of time. (SBC Br. @ 5.)

This argument simply second guesses AGTC's timing, and it assumes that delaying the plant improvements would be beneficial to AGTC's subscribers in some way, but there is no benefit to delayed improvements. The legislature has expressly found that "affordable telecommunications services are essential to the health, welfare and prosperity of all Illinois citizens" (220 ILCS 5/13--102(a) (West 1994). Implicit in this finding is that the *absence* of affordable telecommunications services would be detrimental to the public health, welfare, and prosperity. However, SBC subverts this purpose with its extended construction argument. There was no reason for AGTC to delay its plant improvements any longer, and improving the voice-grade services and toll capacity at the same time it installed advanced services that were required under 13-517 was clearly appropriate, especially since advanced services had a statutory deadline of January 1, 2005.

SBC argues that since AGTC did not have redundancy earlier, it could have further delayed its improvements. Of course, if AGTC's toll line was cut during this extended period, AGTC would be criticized for not avoiding a potential problem sooner, especially since redundant toll networks are the engineering standards for the network. (AGTC Ex. 3 @ 4, 18.)

VIII. AGTC HAS MADE A PROPER ALLOCATION OF COSTS AND AGTC HAS DEMONSTRATED A REVENUE SHORTFALL OF $101,322 FOR IUSF SUPPORT.

Staff's overzealous opposition and bias against universal service support spills over into the accounting issues. Staff argues for a consolidation of the *income* statements of AGTC and A-G Long Distance (AGLD) based upon the premise that AGLD does not compensate AGTC for services it uses. (Staff Br. @ 32.) This premise was debunked in Mr. Schoonmaker's testimony and in AGTC's initial brief and there is no basis whatsoever to combine the income of these two companies for ROR universal service funding purposes. (See AGTC initial brief @ 40.)

All adjustments have been made to account for services that AGLD receives from AGTC. (AGTC Ex. 3 @ 26.) AGLD is a reseller, and therefore it has little real activity. AGLD pays for DSL at tariff rates (Ex. 3 @ 7; AGTC Ex. 5 @ 10), and an allocation for Directors' fees and Mr. Wilkening's time on AGLD has been made based on time spent. (AGTC Ex. 3 @ 8-9.) The Directors spend <u>less than</u> 5 minutes per month on AGLD matters. (AGTC Ex. 4 @ 3.) Moreover, all billing expenses have been accounted for since AGLD pays AGTC directly for those services. (AGTC Ex. 4 @ 3; AGTC Ex. 3 @ 9-10.) Staff further seeks to justify consolidation of the income statements of AGTC and AGLD because Staff points out that there were three instances when AGTC did not <u>initially</u> account for expenses attributable to AGLD. (Staff Br. @ 43.)

These allegations of subsidization are completely overblown and taken out of context. The three instances involve a total of adjustments amounting to $6,691.00 that AGTC made. The first instance involved an allocation of expenses of the Board of Directors' fees to AGLD in the amount of $1,479 and an adjustment of $1,945 for the amount of time Alvin Wilkening spent on AGLD matters for a combined adjustment of $3,424 (AGTC Ex. 3 @ 9-10.) The second example involved billing expenses. AGLD paid AGTC for long distance and internet billing expenses. (AGTC Ex. 3, attch 1(C) Confidential.) However, the Company failed to account for the billing services that AGTC rendered for AGLD for internet <u>only</u> users. This resulted in an adjustment of $1,449.00. (AGTC Ex. 3 @ 25-26.) Finally, in 2003, some members of the Board of Directors and Mr. Wilkening attended a cellular partnership meeting in Schaumburg. Their travel and meal expenses resulted in a third adjustment of $1,818.00. (AGTC Ex. 5 @ 16-17.) Staff's recommendation that the income statements of AGTC and AGLD be combined is excessive and out of proportion to these three inadvertent errors that have been fully accounted for.

Staff's own exhaustive investigation did not reveal any subsidies that were not accounted for. Instead of relying on evidence, Staff relies on speculation to argue that AGLD earns too much money from long distance (an 18.5% return, AGTC Ex 5 @10-11). All of the costs have been properly allocated. Such non-evidence lacks any substance and should be rejected.

Staff argues that customer service costs and plant and equipment costs have not been allocated. (Staff Br. @ 33.) This accusation is not true. All AGTC office personnel record their time when spent on AGLD and the record reflects that adjustment (AGTC Ex. 5 @ 5), and its outside legal and accounting costs are billed to each company according to services received. (AGTC Ex. 5 @ 15.) Staff points out argues that AGLD does not possess any plant to run its business since it has no recorded assets. (Staff Br. @ 32.) AGLD is a *reseller* of long distance and it does not require any plant. Certainly this is no basis for consolidating statements and this is nothing more than a far-fetched attempt to deny AGTC IUSF support.

Staff's subsidization argument is without merit and there is no basis for making any adjustment for general administrative costs for AG Cellular. Staff's allegations are unfounded and overlook the fact that A.G. Cellular is a passive company that is a limited partner in a cellular partnership. (AGTC Ex 5 @ 8-9, 15; AGTC Ex. 4 @ 3.). All functions of the cellular partnership are paid for by the general partner and AG Cellular pays its own legal and other expenses for monitoring the investment. (AGTC Ex 3 @ 15-16). AGTC is not subsidizing AGLD or A.G. Cellular and Staff's adjustments should be rejected.

Perhaps the biggest accounting controversy raised by Staff and SBC involves the proper length of time for projecting future federal USF support as an adjustment on the ROR analysis. AGTC make adjustments to the ROR based upon federal USF support through 2005 which is based on the procedure adopted in the IUSF case, *i.e*., known and measurable accounting standards.(AGTC Ex 3 @ 22, 30). Staff and SBC argue for adjustments to the ROR base on federal USF support 5 to 6 years into the future. (Staff Br @36-38).

Staff's Schedule 1 to its brief is a consolidation of adjustments based on a combination of A-G Long Distance and interstate revenues. Staff erroneously supports a huge adjustment on the basis of unsubstantiated speculative future interstate revenues. (Staff Br. @ 39-40.) By "interstate revenues," Staff apparently means federal USF support in years beyond 2005.[3] This argument goes to extraordinary lengths to exaggerate and misstate AGTC's financial position. Staff's adjustment on line 14 of its schedule 1 is based on a ratio of the old Becker data (described further below) that estimated federal support years into the future (which was not testified to by any witness) in relationship to the amount of AGTC plant investment. This data is not only unreliable and speculative. Federal USF support for future years is not and will not be determined on this ratio and it is absurd to proclaim that it is reasonably accurate. Staff even admits that its calculation of future federal USF support is not precise. Therefore, it cannot be used because it does not meet the statutory standards of 13-301(d) that allows a reduction of state support by the amount of federal support received, *i.e.*, state support may not be reduced on mere estimates years into the future.

Staff refers to the Board presentation made by Mr. Jamie Becker of GVNW Consulting, Inc. at an AGTC Board of Directors meeting on March 10, 2003, and presents a Staff schedule 1 purporting to illustrate revenue requirement for AGTC. Staff's schedule 1 implies that AGTC is "double dipping" by not including these revenues in its presentation. The new "evidence" purports to show the Company has no IUSF funding need. (Staff Br. @ 35-36.) Staff's schedule is based on financial information that is irrelevant because that data, based on 2001, is out of date and because the AGTC revenues which are the beginning point of the Staff's exhibit already *included* much of this revenue. It is further flawed because it does not recognize other revenue adjustments which the Staff's witness had previously recognized.

---

3 AGTC's access revenues are not going to increase because its rates were filed on a prospective basis and already reflect plant additions. (AGTC Ex. 3 @ 21.)

The Becker presentation to the Board of Directors relied on assumptions and estimates based on 2001 data and this case is based on 2003 data. The revenue impacts that Mr. Becker estimated are now different because of changes both in AGTC's underlying financial data and in the national loop cost for USF. Applying the Becker presentation to the data already included in AGTC's and Staff's presentation is much more likely to include "double dipping" since the data presented there already includes much of the impact included in Mr. Becker's presentation. More current information has been provided to Staff and adjustments, as appropriate, have been made, based on much more current information, to account for the revenues that Mr. Becker was merely estimating in his presentation. Staff cannot realistically rely on 2-year old data as a basis to make predictions beyond 2005, but that is what schedule 1 does.

While the Staff cites certain conclusory information from Mr. Becker's presentation in its testimony and brief, Staff neglects to cite the assumptions which qualified Mr. Becker's presentation. For example, Mr. Becker's presentation specifically indicates that it is based on 2001 cost study information and it assumed <u>no other changes</u>, (page 2); it assumes that all the investment would be used for "CWF subscriber OSP" (page 3), and that receipt of the USF portion would be delayed. (Additional USF for the 2003 investment could come in 2005.) (Page 4.) Mr. Becker's projections need to be put into the context of a presentation to a Board of Directors of a small telephone company, who are everyday small businessmen and not sophisticated in the intricacies of telephone separations and accounting. Use of these simplifying assumptions helped to convey the general sense of the possible impact of the proposed investment without getting unduly involved in the intricacies of timing impacts and other changes that impact the actual financial results.

The assumptions that were made in Mr. Becker's presentation are important to consider when analyzing the appropriateness of AGTC's presentation of its revenue requirement. First, Mr. Wilkening testified that the plant additions actually made in 2003 and 2004 included not only subscriber outside plant, but the replacement of and building of plant to carry toll traffic. This plant is not subscriber plant, and is not included in plant for which federal HCL USF is received. Thus, an extrapolation of Mr. Becker's estimates which assumed that all the investment was subscriber plant, would overstate the revenue impacts that would actually occur.

Second, Mr. Schoonmaker testified about the impact that the changing national average loop cost for 2005 has on the amount of USF received. (AGTC Ex. 3 @ 32.) Mr. Becker's numbers, based on 2001 cost study information, would not correctly reflect the actual HCL USF that AGTC would receive, since the national average loop cost, a key factor in determining the HCL USF, has changed considerably from the value used in conjunction with 2001 data and is expected to change further over time.[4]

Third, Mr. Becker's simplified "snapshot" view of the revenue impact, as presented in the Board presentation, did not fully take into account the impact that depreciation has over time in reducing the rate base and thus the revenues received from interstate settlements and from HCL USF.

In this proceeding, however, the Staff sponsored expert witnesses who are expected to be fully knowledgeable about these issues and to account for them. In his testimony Mr. Voss describes the data request presented to the company where he requested that AGTC estimate the federal USF revenue impacts of the investments over a period of several years.

4 See AGTC Ex 3 @ 32 for the change just from 2004 to 2005

The Company responded to that data request with projections that took into account all of the factors outlined above related to the actual investments that were made, the timing of revenue flows, etc. This analysis, for example, recognized that some of the revenues that Mr. Becker had forecasted were already included in the 2003 test period, since part of the investments were actually made in 2003. Based on this data request response, Mr. Voss and Mr. Schoonmaker agreed to further adjustments to the test period revenues to reflect further those revenues that the Company would receive in 2004 and even in some cases 2005. (AGTC Ex. 3 @ 20-2003, settlement received from NECA in 2004; AGTC Ex. 3 @ 21, 2005 high-cost loop payments based on 2003; AGTC Ex. 3 @ 24, interstate common line support in 2004 and central office depreciation expense.)[5] Any inclusion of Mr. Becker's estimates, which are incorrect and out of date, *on top of* the revenue that was partially reflected in the 2003 test year and further reflected in the adjustments, would be double counting.

Staff's Schedule 1, uses the adjusted Becker data as the only *estimate* of interstate revenues, and does not reflect the fact that Staff accepted an adjustment to reduce revenues of $58,030 (Staff Exhibit 2.0C @ 7) for 2002 revenues reported in 2003, and a revenue reduction of $31,343 of local switching support (AGTC Exhibit 3 @ 24) which were accepted by Mr. Voss (Staff Exhibit 4.0C @ 12, Lines 232-234). Staff's Schedule 1 further does not account for the reduction in local switching report of $18,180 (AGTC Exhibit 5.0 @ 17). None of these adjustments would have been estimated by Mr. Becker's presentation

Staff propounded numerous data requests, which were answered, and Staff reviewed AGTC's audit and audit workpapers. Staff's allegation that AGTC is already earning in excess of 11.21% requires Staff to create unsupported adjustments. AGTC is <u>not</u> earning in

[5] See also Staff Exhibit 4.0C @ 10 and 12.

excess of the 11.21% ROR, and Staff's adjustments are improper and unfounded and should be rejected.

SBC also argues for a multi-year projection of federal USF support several *years* into the future without any assurance that the amount of support it projects will be there and even though its rules for determining support expire on July 1, 2006. The terms of the revised rules are uncertain and there is not an accurate way to calculate federal USF support that far into the future. (AGTC Ex. 5 @ 22-23; AGTC Ex 3 @ 32.) It would be unlawful for the Commission to make multi-year projections of future federal USF support when the amounts are uncertain, because 13-301(d) requires a reduction in IUSF support only by "any federal universal service support *received.*" If AGTC or any other LEC does not receive the federal support, the state support cannot be reduced, and the projections that Staff and SBC make for future federal USF support are in doubt.

If one were to adopt SBC's approach, then it also stands to reason that a company should estimate its construction costs years into the future. Based on SBC's reasoning, when AGTC was participating in the original USF case, AGTC should have been allowed to include its projected costs of upgrading its plant for 2003 and 2004 and it should have been receiving IUSF support over the past several years. Clearly if one projects into the future beyond the known and measurable standard, it opens the door to all kinds of unsupportable guesswork which clearly leads to funding inaccuracies.

AGTC used the same standard that was agreed to and used by the Commission in the USF case, 00-0233, the known and measurable standard. (AGTC Ex. 3 @ 30-32.) It is clear that the Commission has already rejected SBC's multi-year projections, and using multi-year projections at this time it would be a denial of equal protection to AGTC. In the USF case, Verizon urged the Commission to reduce the fund by $3 million based upon the FCC's increase in high cost loop support and loop support for rural LEC for 2001. (2nd I.O. @ 35.) However, the Commission rejected this proposal because the projections were insufficient and too remote in time to show the *exact amount* of increased funding the requesting carriers would receive in future years. (2nd I.O. @ 37, 56-57.) Likewise, in the present case the evidence is insufficient to show what AGTC will receive in federal USF support beyond 2005 because the FCC is in the process of reviewing its rules for universal service support, and these rules may be significantly modified. (AGTC Ex. 3 @ 23, 31, 32; AGTC Ex 5 @ 22-23.)

SBC also alleges that there is a possibility of double recovery because of a lag time in federal USF support payments. The Commission was aware of this possibility in the IUSF case when it established the standards for IUSF support. In AGTC's case, a danger of double recovery is not present because if the fund is reviewed in 2006, AGTC's finances will be reviewed soon enough to reassess the impact of federal support.

IX. ALHAMBRA's IUSF FUNDING SUPPORT SHOULD BE RETRO-ACTIVE TO DECEMBER 17, 2003.

During the proceedings, SBC objected to funding for AGTC as of December 17, 2003, but SBC did not raise that matter in its initial brief. Staff, however, as a matter of equity agreed that should IUSF support be granted to AGTC, it should be retroactive to December 17, 2003. (Staff Br. @ 44.) 13-301(d) directs that <u>all costs</u> of the fund be collected on a competitive and neutral and non-discriminatory basis. AGTC's need was a *cost* of the fund when AGTC filed its petition and finding should be retroactive.

X. CONCLUSION

For the foregoing reasons, the Commission should direct the Administrator of the Illinois Universal Service Fund to provide support to Alhambra-Grantfork Telephone Company in the annual amount of $101,322.00, effective December 17, 2003, and for such other and further relief as the Commission deems just.

Respectfully submitted,

ALHAMBRA-GRANTFORK TELEPHONE COMPANY

BY: ________________________________

GARY L. SMITH

Gary L. Smith (#2644029)
Loewenstein, Hagen & Smith, P.C.
1204 South Fourth Street
Springfield, IL 62703
Tel.: 217/789-0500
Fax: 217/522-6047
E-Mail: lexsmith@lhoslaw.com

PROOF OF SERVICE

04-0354

The undersigned certifies that on February 9, 2005, a copy of Alhambra's Reply Brief were served upon the following person(s) by electronic mail as follows:

Sean Brady
Matthew Harvey
Illinois Commerce Commission
160 N. LaSalle St., Ste. C-800
Chicago, IL 60601-3104
sbrady@icc.state.il.us
mharvey@icc.state.il.us

Nancy J. Hertel
Ameritech Illinois
225 W. Randolph St., 29th Fl.
Chicago, IL 60606
nancy.j.hertel@ameritech.com

John E. Rooney
Sarah Naumer
Sonnenschein Nath & Rosenthal
233 South Wacker Dr.
Chicago, IL 60606
jrooney@sonnenschein.com
snaumer@sonnenschein.com

Genio Staranczak
Case Manager
Illinois Commerce Commission
527 East Capitol Avenue
Springfield, IL 62701
gstaranc@icc.state.il.us

Mr. Larry Jones
Administrative Law Judge
Illinois Commerce Commission
527 East Capitol Avenue
Springfield, IL 62701
ljones@icc.state.il.us

Sally Briar
Daivd J. Chorzempa, Law Department
AT&T Communications of Illinois, Inc.
222 West Adams, Ste. 1500
Chicago, IL 60606
sbriar@att.com
dchorzempa@att.com

Gary L. Smith